Supreme Court, U.S.
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90-358

No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

TRAVEL SERVICES, INC.,
Petitioner,

v.

GOVERNMENT OF THE VIRGIN ISLANDS,
ANTHONY P. OLIVE, Director, Virgin Islands
Bureau of Internal Revenue,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether 49 U.S.C. sec. 1513(a), which expressly prohibits the Virgin Islands from levying gross receipts taxes "directly or indirectly . . . on the sale of air transportation," prohibits the Virgin Islands from imposing gross receipts taxes on air transportation sales by travel agencies.

PARTIES TO THE PROCEEDINGS BELOW

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IN THE

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OCTOBER TERM, 1990

No. —

TRAVEL SERVICES, INC.,
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v.

GOVERNMENT OF THE VIRGIN ISLANDS,
ANTHONY P. OLIVE, Director, Virgin Islands
Bureau of Internal Revenue,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 904 F.2d 186 and is printed in appendix "A." The opinion of the District Court of the Virgin Islands, Appellate Division, is reproduced in Appendix "B." The opinion of the Territorial Court of the Virgin Islands is reproduced in Appendix "C."

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on May 31, 1990. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

49 U.S.C. sec. 1513 provides in pertinent part:

> (a) No state (. . . including the Virgin Islands) shall levy or collect a tax, fee, head charge, or other charge, *directly or indirectly, on persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom*; . . .
>
> (b) Nothing in this section shall prohibit a State . . . from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services.

33 V.I.C. sec. 43(a) provides in pertinent part:

> Every individual and every firm, corporation, and other association doing business in the Virgin Islands shall report *their gross receipts and pay a tax of four percent (4%) on the gross receipts* of such business . . .

STATEMENT OF THE CASE

Petitioner is a travel agency doing business in the United States Virgin Islands. It sells, among other things, airline tickets. In its capacity as the seller of air transportation, petitioner is closely regulated and supervised by the airlines. Petitioner acts as an agent of the airlines, selling airline tickets solely under the terms and conditions set by the airlines.

Petitioner participates in the Agent Reporting Plan (ARP). Under this plan, petitioner deposits the proceeds of airline ticket sales into an account against which ARP has a right of withdrawal. ARP withdraws the proceeds on behalf of the airlines and leaves only the portion that represents petitioner's commissions.

By law, petitioner is required to sell airline tickets at the same price as those tickets are sold by the airlines

themselves. If a ticket is sold directly by an airline, the Virgin Islands Government levies no gross receipts tax on any portion of the sale. If the same ticket is sold at an identical price by a travel agent such as petitioner, the Virgin Islands Government contends that it is entitled to levy a gross receipts tax on the portion of the sale that is paid to the agency as its commission.

Pursuant to 33 V.I.C. sec. 43(a), petitioner filed monthly gross receipts tax returns for June 1983 through April 1986, omitting from those returns income representing commissions earned from selling air transportation. Petitioner excluded gross receipts from the sale of air transportation because of the plain language of 49 U.S.C. sec. 1513(a), which prohibits the levy of "a tax, fee, head charge, or other charge, directly or indirectly . . . on the sale of air transportation or on the gross receipts derived therefrom; . . ." The Virgin Islands Department of Internal Revenue disagreed and assessed a deficiency in the amount of the withheld gross receipts taxes.

Petitioner filed an action for redetermination of tax in the Territorial Court of the Virgin Islands, urging that 49 U.S.C. sec. 1513(a) preempted 33 V.I.C. sec. 43 (a) to the extent that the local statute attempted to impose a gross receipts tax on the sale of air transportation. Petitioner advanced three arguments. First, the plain wording of the Federal statute protected the act of selling air transportation, irrespective of whether the seller was an airline or an agent of the airline. Second, Congress' intent in enacting 49 U.S.C. sec. 1513(a) was to protect the entire airline industry, not just airlines, from multiple taxes that would inhibit air travel. *Aloha Airlines, Inc. v. Director of Taxation of Hawaii*, 464 U.S. 7 (1983). Third, the policies of inexpensive air travel underlying the Airport Development Acceleration Act of which 49 U.S.C. sec. 1513(a) forms a part are

undermined if local entities can impose gross receipts taxes on travel agents for selling airline tickets. Since agents cannot charge higher prices than do airlines, the cost of added taxes must ultimately be passed on to the consumer in the form of higher ticket prices across the board.

The matter was submitted on cross-motions for summary judgment based on stipulated facts. (Appendix "D"). In Memorandum Opinion and Order dated June 23, 1988, the Territorial Court granted summary judgment in favor of the Virgin Islands Government, holding that 49 U.S.C. sec. 1513(a) did not prevent the local government from imposing a gross receipts tax on a travel agent's sale of air transportation because that sale constituted a "service" and not the sale of air transportation. On August 18, 1989, the District Court of the Virgin Islands, Appellate Division, affirmed the decision of the Territorial Court. That decision was in turn affirmed by the United States Court of Appeals for the Third Circuit on May 31, 1990.

REASONS FOR GRANTING WRIT

The narrow interpretation placed on 49 U.S.C. sec. 1513(a) by the Third Circuit is contrary to the plain wording of the statute and to existing precedent. It undermines the very policies that the statute was designed to foster. The impact of the Circuit's decision is of nationwide import. If the opinion is permitted to stand, states and municipalities will be permitted to impose gross receipts taxes on commissions derived from the sale of air transportation, inevitably resulting in higher ticket prices contrary to the scheme envisioned by Congress in the Airport Acceleration Act.

In reviewing 49 U.S.C. sec. 1513(a) in a related context, the Supreme Court observed: "When a Federal statute unambiguously forbids the States to impose a

particular kind of tax on an industry affecting interstate commerce, courts need not look beyond the plain language of the federal statute to determine whether a state statute that imposes such a tax is preempted." *Aloha Airlines v. Director of Taxation*, 464 U.S. 7, 12 (1983). 49 U.S.C. 1513(a) is a model of clarity. By its plain wording, it protects the act of selling air transportation from gross receipts taxation. Taxes may not be collected "directly or indirectly . . . on the sale of air transportation or on the gross receipts derived therefrom." The fallacy in the opinion below is its attempt to read into the statute the condition that the statute proects only air carriers themselves. Such is patently not the case, nor was it ever intended to be. See *Aloha Airlines v. Director of Taxation, supra*, 464 U.S. at 13.

Moreover, the legislative history of the statute is consistent with its plain meaning. Senator Pearson observed, "The committee bill prohibits State and local taxation of air fares . . ." 119 Cong. Record, part 3, pp. 3349-3350.

The Circuit erroneously concluded that taxing a travel agent's commissions derived from the sale of air transportation was not a tax on the sale of air transportation, but rather a tax on the sale of a "service" to airlines, and hence taxable under 49 U.S.C. sec. 1513(b). Such reasoning is, of course, obviously flawed, since the activity at issue here is the sale of air transportation. This is precisely the activity that the statute exempts from gross receipts taxation.

In effect, the Circuit affixed the label of "service" to petitioner's sale of air transportation, and then concluded that the new label rendered petitioner's sale of air transportation something other than what it really was. This is the identical mode of reasoning rejected by the Supreme Court in *Aloha Airlines v. Director of Taxation, supra.* There, Hawaii sought to tax the carriage of air

passengers by levying a "property tax" on airlines computed on gross receipts. The Supreme Court rejected this subterfuge for two reasons. First, even though Hawaii imposed the tax on air carriers instead of on air travelers, the reach of sec. 1513(a) was not so narrow: the statute "unambiguously forbids the States to impose a particular kind of tax on an industry affecting interstate commerce . . ." Second, even though Hawaii styled its tax as a property tax, the Court looked to the effect of the tax and deemed it a gross receipts tax, and hence preempted. In sum, emphasized the Court, sec. 1513(a) was designed to protect the air travel industry. Local governments could not circumvent the law's reach simply by taxing different components of the industry or by calling taxes something other than what they really were. Accordingly, in the instant case, the fact that the Circuit chose to call petitioner's sale of air transportation a "service" in no way changes the reality of petitioner's activity. Petitioner sells air transportation and cannot be taxed on gross receipts derived from that activity.

Moreover, the Circuit's reasoning is at odds with judicial precedent which treats airline ticket sales by carriers as legally identical to airline ticket sales by travel agencies because of the close principal-agent relationship between the two. See *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 889 F.2d 751 (1989) and 806 F.2d 722 (1986), where the Seventh Circuit rejected the distinction between the sale of air travel service by a carrier directly or through an agency on the one hand, and their agency's reservation-ticketing activities on the other.

Existing case law draws a sharp distinction between "goods and services" that can be taxed under 49 U.S.C. sec. 1513(b) and the "sale of air transportation" that is protected under sec. 1513(a). The Supreme Court recently approved sales tax on fuel used by air carriers.

Wardair Canada, Inc. v. Florida Dept. of Revenue, 477 U.S. 1 (1986). In a concurring opinion, Chief Justice Burger observed that section (b) was added to ensure that the statute would not "prohibit even unobjectionable taxes such as landing fees, fuel taxes and sales taxes on food provided to airline passengers." In like spirit, lower courts have sustained taxes on the sale of packaged meals to passengers, *Air Jamaica, Ltd. v. State Dept. of Revenue*, 374 So.2d 575 (Fla. App. 1979); on the sale of air freight transportation, State ex rel. *Arizona Dept. of Revenue v. Cochise Airlines*, 128 Ariz. 432, 626 P.2d 596 (1980); and on the sale of fuel, In re *Manier*, Bankruptcy, N.D. Ohio 1986, 59 B.R. 588. See also, *Salem Transportation Co. v. Port Authority of New York and New Jersey*, 611 F. Supp. 254 (D.C.N.Y. 1985), finding that the sale of ground transportation is not protected under sec. 1513(a).

Until the Third Circuit's break with precedent in this case, however, no court had ever approved the levy of gross receipts taxes on the sale of air transportation. In striking down a privilege tax on air carrier ticket sales, the Supreme Court of Arizona emphasized that "the sales tax referred to in section 1513(b) on the sales of goods and services cannot logically include sales of air transportation or sales directly connected with the carriage of persons in air commerce." State ex rel. *Arizona Department of Revenue v. Cochise Airlines, supra*, 626 P.2d at 601.

CONCLUSION

This is an appropriate case for Supreme Court review. The Third Circuit has construed a Federal statute contrary to its plain meaning and to its legislative history. The Circuit's construction is contrary to existing precedent and upsets a carefully drawn nationwide regulatory scheme. If permitted to stand, the Circuit's interpretation of 49 U.S.C. sec. 1513 will allow local governments

to impose taxes that will affect the price of airline travel with national consequences.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

Filed May 31, 1990

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-3619

TRAVEL SERVICES, INC.,
Appellant

v.

GOVERNMENT OF THE VIRGIN ISLANDS,
ANTHONY P. OLIVE, Director,
Virgin Islands
Bureau of Internal Revenue,
Appellees

Appeal from the District Court
of the Virgin Islands
Division of St. Croix,
Appellate Division
(D.C. Civil Action No. 88-264)

Argued: April 25, 1990

PRESENT: SLOVITER, STAPLETON and
HUTCHINSON, *Circuit Judges*

Opinion filed May 31, 1990

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OPINION OF THE COURT

HUTCHINSON, *Circuit Judge.*

In this appeal we decide whether 49 U.S.C.A. § 1513(a) (West 1976) preempts a Virgin Islands' gross receipts tax on the commissions earned by travel agents for the sale of airline tickets. For the reasons stated below, we hold that § 1513(a) does not preempt such a tax.

I.

Appellant, Travel Services, Inc. (Travel Services), operates a travel agency in the United States Virgin Islands. Among its activities is the sale of airline tickets, as agent for various airlines, to persons wishing to fly to and from the Virgin Islands. It sells those tickets at the same price the airlines would charge and receives from them a commission. When it sells an airline ticket, Travel Services is required to deposit the fares into a

special account that it holds in trust for the airlines. The airlines draw funds from this account for the total fares less the commissions owed to Travel Services. The price of the airline ticket is established by the airlines and cannot be increased or decreased by Travel Services. The amount paid by a passenger is the same whether he or she purchases a ticket from Travel Services or directly from the air carrier.

The Virgin Islands gross receipts tax, set forth at V.I. Code Ann. tit. 33, § 43(a) (Supp. 1989-90), provides in relevant part:

> Every individual and every firm, corporation, and other association doing business in the Virgin Islands shall report their gross receipts and pay a tax of four percent (4%) on the gross receipts of such business.

The United States Congress has enacted a statute concerning taxes levied on airline travel. That statute, set forth at 49 U.S.C.A. § 1513 (West 1976 & Supp. 1990),[1] reads in relevant part:

> (a) No State (or political subdivision thereof, including . . . the Virgin Islands . . .) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom . . . .
>
> (b) . . . [N]othing in this section shall prohibit a State (or political subdivision thereof, including . . . the Virgin Islands . . .) from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes,

---

[1] For a discussion of the history behind the passage of 49 U.S.C.A. § 1513, see *Aloha Airlines v. Director of Taxation*, 464 U.S. 7, 8-10 (1983).

> net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services . . . .

Travel Services filed tax returns for the period of June 1983 through April 1986, as required under the Virgin Islands statute, but did not include in its reported gross receipts the commissions it had earned on the sale of airline tickets. The Virgin Islands taxing authorities assessed gross receipts taxes and interest on Travel Services' commissions from the sale of airline tickets for the period of June 1983 through April 1986. Travel Services then brought an action in the Territorial Court of the Virgin Islands contending that the Virgin Islands' assessment of tax on the commissions it had earned from the sale of airline tickets was prohibited by 49 U.S.C.A. § 1513(a).

The parties filed stipulated facts and, on cross-motions for summary judgment, the territorial court denied Travel Services' motion and granted summary judgment to the government. The territorial court held that the tax imposed by the Virgin Islands statute was not a tax on gross receipts derived from the sale of air transportation preempted by 49 U.S.C.A. § 1513(a), but instead was a tax on services permitted by § 1513(b). The Appellate Division of the District Court of the Virgin Islands accepted the territorial court's reasoning and affirmed. This appeal followed.

II.

The territorial court had subject matter jurisdiction pursuant to V.I. Code Ann. tit. § 76(a) (Supp. 1989-90). The district court had appellate jurisdiction over Travel Services' appeal from the final judgment of the territorial court pursuant to 48 U.S.C.A. § 1613a(a) (West 1987), and V.I. Code Ann. tit. 4, § 33 (Supp. 1989-90). We have appellate jurisdiction over the final order of the district court. *See* 28 U.S.C.A. § 1291 (West Supp.

1990); 48 U.S.C.A. § 1613a(c) (West 1987). Since the issues the parties raise involve statutory construction, our scope of review is plenary. *See Chrysler Credit Corp. v. First Nat'l Bank & Trust Co.*, 746 F.2d 200, 202 (3d Cir. 1984).

III.

Section 1513(a) prohibits the Virgin Islands from "directly or indirectly" taxing gross receipts derived from the sale of air transportation. Travel Services contends § 1513(a) should be construed broadly to prohibit a tax on travel agency commissions paid from an airline's gross receipts. However, in § 1513(b) Congress limited the broad sweep of § 1513(a) by permitting states to impose "taxes other than those enumerated in subsection (a) . . . including . . . sales or use taxes on the sale of goods or services." *See Wardair Canada, Inc. v. Florida Dep't of Revenue*, 477 U.S. 1, 7 (1986).

We believe the broad reading of § 1513(a) that Travel Services suggests would be inconsistent with the Supreme Court's interpretation of the statute in *Wardair*. Under that reading, every item paid from an airline's gross receipts, such as an airline's direct purchase of goods or services or an airline employee's wages, would be exempt from taxation. However, in *Wardair*, the Supreme Court held that a tax on aviation fuel sold to airlines was not preempted by § 1513(a), *see Wardair*, 477 U.S. at 7, without regard to whether the tax would ultimately be paid out of an airline's gross receipts derived from the sale of air transportation. Thus, we reject Travel Services' broad reading of § 1513(a).

Instead, we think that the commissions Travel Services receives from the airlines are commissions paid for the service of selling airline tickets. A tax on these commissions is not a tax on gross receipts from the sale of air transportation prohibited by § 1513(a); it is merely a tax on compensation paid for a service. Section 1513(b)

allows the Virgin Islands to impose taxes "other than those enumerated in [§ 1513(a)], including . . . sales or use taxes on the sale of goods or services." The Virgin Islands tax on Travel Services' commissions is not one of the enumerated taxes that § 1513(a) prohibits, and thus it is expressly allowed under § 1513(b).

The fact that the commissions are paid from the same account into which the gross receipts from the sale of airline tickets are deposited does not change the nature of the compensation. As the territorial court persuasively reasoned:

> The fact that [Travel Services] is paid from the same account in which the gross receipts from the sale of air transportation are deposited is irrelevant. Those receipts are not the property of [Travel Services]. The instant that a portion of those receipts is assigned, or paid to [Travel Services], the character of that portion is altered. It no longer represents "gross receipts derived from the sale of air transportation." It is now commissions for services rendered. This is so because its purpose is not for travel, but to compensate [Travel Services] for services rendered. The airlines, by paying commissions, surely are not purchasing air transportation. Obviously, this is not a transaction between an airline and a passenger, but rather it is a transaction between an airline and its travel agent.

Travel Services, Inc. v. Government of the Virgin Islands, Civil No. 204/87, slip op. at (V.I. Terr. Ct. June 23, 1988), *reprinted in* Appendix of Appellant (App.) at 30.

Travel Services argues that the tax on its commissions is an indirect tax on the sale of air transportation prohibited by § 1513(a). In support, Travel Services relies on *Aloha Airlines v. Director of Taxation*, 464 U.S. 7 (1983). However, *Aloha Airlines* did not speak to the issue this case raises. In *Aloha Airlines*, the Supreme

Court held that a state tax, denominated as a property tax on airlines measured by their gross receipts, was in reality a tax on the gross receipts of airlines selling air transportation and carrying persons traveling in air commerce. *See* 464 U.S. at 13-14. The Court held that § 1513(a) preempted such a tax. *See id.* at 14.

The Virgin Islands tax on Travel Services' commissions is distinct from the tax at issue in *Aloha Airlines*. The tax at issue in this case is a tax on income derived from services provided. It is not analogous to the property tax measured by airline gross receipts, which the Supreme Court held was preempted in *Aloha Airlines*.

Travel Services also argues that the Virgin Islands tax on travel agents' commissions is not a tax on income derived from services permitted under 49 U.S.C.A. § 1513(b). In support of this argument, Travel Services relies on *State ex rel. Arizona Dep't of Revenue v. Cochise Airlines*, 128 Ariz. 432, 626 P.2d 596 (Ariz. Ct. App. 1980), and Ohio Op. Atty. Gen. No. 73-117 (1973). In *Cochise Airlines*, Arizona had imposed directly on an airline a privilege tax based on the volume of business. The Court of Appeals of Arizona held that § 1513(a) preempted the tax insofar as it related to the transportation of airline passengers. *See* 626 P.2d at 601. The Ohio Attorney General's opinion similarly concluded that § 1513(a) preempted an Ohio excise tax on airlines. Here, the territorial government of Virgin Islands is not imposing a privilege tax or an excise tax on airlines, but a tax on the commissions earned by a travel agent for providing services. In our view, the authorities Travel Services relies on are not controlling.

Because the tax at issue is a tax on commissions derived from services provided to airlines and not a tax on gross receipts from the sale of air transportation, § 1513(a) does not preclude the Virgin Islands from levying and collecting such a tax on Travel Services' commissions.

IV.

For the reasons stated above, we hold that § 1513(a) does not preempt the application of V.I. Code Ann. tit. 33, § 43(a) to impose a tax on the commissions earned by travel agents for the sale of airline tickets. We will affirm the judgment of the district court.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF SAINT CROIX
APPELLATE DIVISION

D.C. Civil No. 1988-264

T.C. Civil No. 204-1987

TRAVEL SERVICES, INC.,
Plaintiff/Appellant,

vs.

GOVERNMENT OF THE VIRGIN ISLANDS
and ANTHONY OLIVE, Director of
V.I. BUREAU OF INTERNAL REVENUE,
Defendants/Appellees.

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On Appeal from the
Territorial Court of the Virgin Islands *

BEFORE: O'BRIEN,** Presiding Judge; McGLYNN, U.S. District Judge***, and SMOCK, Territorial Court Judge

OPINION

The issue presented is whether 49 U.S.C.A. § 1513 (Supp. 1988) permits the Government of the Virgin Islands to tax the commissions earned by travel agents on the sale of airline tickets. The Territorial Court concluded that it does. We affirm.

I.

The Government of the Virgin Islands assessed plaintiff-appellant Travel Services, Inc., doing business as Southerland Tours (hereafter "Southerland"), a deficiency for failure to pay gross receipts taxes [1] on com-

* This matter was submitted on the briefs of the parties, pursuant to V.I. Code Ann. tit. 5, App. VII R. 12(6) (Supp. 1988).

** The Honorable David V. O'Brien has recused himself from consideration of this appeal.

*** The Honorable Joseph L. McGlynn is sitting by designation from the U.S. District Court of Pennsylvania.

[1] V.I. Code Ann. tit. 33, § 43 (Supp. 1988) provides:

> (a) Every individual and every firm, corporation, and other association doing business in the Virgin Islands shall report their gross receipts and pay tax of four percent (4%) on the gross receipts of such business. . . .
>
> (b) The term "gross receipts," as used in this title shall mean all receipts, cash or accrued, of the taxpayer for services or derived from trade, business, commerce or sales, and the value accruing from the sale of tangible personal property or services, or both, including rentals, fees and other involvements, however,* designated . . . .

* So in original.

missions earned on the sale of airline tickets. Southerland maintained that federal law, 49 U.S.C.A. § 1513(a), prohibits defendants from taxing those commissions. The parties entered into a stipulation of facts and both moved for summary judgment. The Territorial Court denied Southerland's motion, granted defendants' motion, and entered judgment in favor of defendants. Southerland appeals from that judgment.

49 U.S.C.A. § 1513 provides in pertinent part:

> (a) *No* state ([or *Territory*] including . . . the Virgin Islands . . .) *shall* levy or *collect a tax*, fee, head charge, or other charge, *directly or indirectly*, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or *on the sale of air transportation* or on the gross receipts derived therefrom. . . .
>
> (b) [*N*]*othing in this section shall prohibit a State* ([or Territory] including . . . the Virgin Islands . . .) *from the* levy or *collection of* taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or *use taxes on the sale of* goods or *services*. . . .

Id. (emphasis added). Southerland contends that its commissions are proceeds derived "from the sale of air transportation" and, as such, cannot be taxed by the defendants. 49 U.S.C.A. § 1513(a). Defendants, however, claim that the tax on commissions is a tax on services and is explicitly permitted by 49 U.S.C.A. § 1513(b).

II.

Southerland is a full service travel agency which, among other things, sells air transportation for approximately sixty airlines. Pursuant to an agreement with the Agent Reporting Plan (ARP), a corporation, all pro-

ceeds from the sale of air transportation are deposited into Southerland's account. These proceeds belong to the airlines and are not property of Southerland. ARP draws from that account all amounts except those representing commissions earned by Southerland.

The Territorial Court focused on the *purpose* of the income and the *parties* involved. It concluded that the commission income is derived from the sale of a service and is, therefore, taxable. The court explained that

> careful scrutiny of Southerland's business operations reveals that it performs two activities with one act. It undeniably sells air transportation, and by so doing, it performs a service to airlines for a fee. Both activities, though related, are separate and distinct for tax purposes. The Virgin Islands seek to tax only one—the sale of a service.
>
> . . . .
>
> . . . [T]he character or classification of income for tax purposes, changes depending on its purpose and the parties involved. Southerland admits that the gross receipts which it collects from passengers are the property of the airlines. In this respect, Southerland is merely a conduit for payment of airline tickets. The purpose of the payment is for travel. Accordingly, these receipts represent a transaction between the airlines and its passengers. Such receipts represents the sale of air transportation—the activity sought to be pre-empted by § 1513(a).
>
> The fact that Southerland is paid from the same account which the gross receipts from the sale of air transportation are deposited is irrelevant. Those receipts are not the property of Southerland. The instant that a portion of those receipts is assigned, or paid to Southerland, the character of that portion is altered. It no longer represents "gross receipts derived from the sale of air transportation." It is

> now commissions for services rendered. This is so because its purpose is not for travel, but to compensate Southerland for services rendered. The airlines, by paying commissions, surely are not purchasing air transportation. Obviously, this is not a transaction between an airline and a passenger, but rather it is a transaction between an airline and its travel agent.

Travel Services, Inc. v. Government of the Virgin Islands, Civ. No. 204-87 at 5-7 (Terr. Ct. St. Croix June 23, 1988).

We agree with this conceptual analysis of the issue presented and will, consequently, affirm the Territorial Court's decision.

DATED this 18th day of Aug., 1989.

IN THE DISTRICT COURT OF THE
VIRGIN ISLANDS
DIVISION OF SAINT CROIX
APPELLATE DIVISION

D.C. Civil No. 1988-264

T.C. Civil No. 204-1987

TRAVEL SERVICES, INC.,
Plaintiff/Appellant,

vs.

GOVERNMENT OF THE VIRGIN ISLANDS
and ANTHONY OLIVE, Director of
V.I. BUREAU OF INTERNAL REVENUE,
Defendants/Appellees.

ELLEN G. DONOVAN, ESQ.
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Christiansted, St. Croix
U.S. Virgin Islands 00820
—Atty. for Plaintiff-Appellant

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Assistant Attorney General
Department of Justice
#46 Norre Gade
St. Thomas, Virgin Islands 00801
—Attys. for Defendants/Appellees

On Appeal from the
Territorial Court of the Virgin Islands*

BEFORE: O'BRIEN, ** Presiding Judge; McGLYNN, U.S. District Judge***, and SMOCK, Territorial Court Judge

JUDGMENT

Having considered the issue presented on appeal and having filed an opinion of even date herewith, it is hereby *ORDERED and ADJUDGED*:

THAT the judgment of the Territorial Court is AFFIRMED.

DATED this 18th day of Aug., 1989.

FOR THE COURT:

/s/ David V. O'Brien
DAVID V. O'BRIEN
Chief Judge

ATTEST: ORINN ARNOLD
Clerk

by: Margaret Richards
Deputy Clerk

---

* This matter was submitted on the briefs of the parties, pursuant to V.I. Code Ann. tit. 5, App. VII R. 12(6) (Supp. 1988).

** The Honorable David V. O'Brien has recused himself from consideration of this appeal.

*** The Honorable Joseph L. McGlynn is sitting by designation from the U.S. District Court of Pennsylvania.

APPENDIX C

IN THE TERRITORIAL COURT OF THE
VIRGIN ISLANDS
DIVISION OF ST. CROIX: KINGSHILL

Civil No. 204/87

ACTION FOR DETERMINATION OF TAX

TRAVEL SERVICES, INC.,
Plaintiff,

v.

GOVERNMENT OF THE VIRGIN ISLANDS
and ANTHONY P. OLIVE, Director of the
Virgin Islands Bureau of Internal Revenue,
Defendants.

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PETERSEN, Judge

MEMORANDUM OPINION AND ORDER

June 23, 1988

This matter is before the Court on motions for summary judgment filed by both parties on June 1, 1988. These motions present this Court with a novel issue: Whether 49 USC § 1513(a) pre-empts the Virgin Islands Gross Receipts Tax Statute, to the extent that it imposes a tax on the gross receipts of travel agencies. For the reasons mentioned below, this Court concludes that the territorial statute is not pre-empted.

FACTS

Plaintiff, Travel Services, Inc., is a corporation doing business in the Virgin Islands under the trade name of Southerland Tours (hereinafter referred to as Southerland). Southerland is a full service travel agency whose activity includes arranging and selling air transportation, hotel accommodations, land tours, cruises, land transportation, and car rentals. Pursuant to agreements with International Airlines Travel Agent Network (IATAN) and Agent Reporting Plan (ARP, Southerland sells tickets for approximately sixty airlines. The ticket stock, travel documents, and airline plates given to travelers are the property of the airlines. Southerland does not own or operate aircrafts. IATAN and the various airlines impose certain standards, terms, and conditions to which Southerland must adhere when arranging and selling air transportation. Southerland, for example, cannot alter the price of an airline ticket. It also cannot give refunds without written instructions from the airlines. Employees of Southerland are trained by the airlines in the same fashion as airline employees. This insures that air transportation is sold to the public at the same fares and under the same terms, conditions, and restrictions whether purchased directly from an airline or through a travel agency.

Under Southerland's agreement with ARP, all proceeds from the sale of air transportation are deposited in Southerland's account. These proceeds belong to the airlines and are not the property of Southerland. ARP draws all amounts from this account, except an amount which represents commissions earned by Southerland.

Title 33 of the Virgin Islands Code imposes a tax of four percent on the gross receipts of all corporations doing business in the Virgin Islands. 33 V.I.C. § 41 and § 43. In 1973, Congress enacted 49 USC § 1513(a) which prohibited the Virgin Islands from collecting a gross receipts tax on the sale of air transportation, or on the gross receipts derived from such sale. Consequently, defendant, Director of Internal Revenue Bureau, took the position that the Bureau will not collect gross receipts taxes from airlines, but will continue to collect such taxes from travel agencies. Thus, if an agency sells a ticket for $100 and earns a commission of $10 the Director will tax the $10.

Pursuant to 33 V.I.C. § 43, plaintiff filed monthly gross receipts tax returns for the period of June 1983 through April 1986. Upon conducting an examination of these returns, the Director determined that Southerland had omitted a total of $1,655,026.16 from its monthly gross receipts. This amount, derived from a profit and loss statement, represented commissions earned for selling air transportation. The Director assessed a deficiency in Southerland's gross receipts tax for the periods mentioned of $44,377.02 and $10,399.43 as interest. Southerland objected to the tax and filed the instant action alleging that the Virgin Islands tax was pre-empted by 49 USC § 1513(a). Both parties filed motions for summary judgment and thoroughly briefed the relevant issues.

DISCUSSION

These motions for summary judgment require the Court to decide whether 49 U.S.C. § 1513(a) pre-empts

the Virgin Islands Gross Receipts Tax Statute to the extent that it imposes a tax on the gross receipts of travel agencies.

This Court must commence its analysis with the language employed by Congress as the legislative purpose is generally reflected in the ordinary meaning of the words used. *American Tobacco Co.* v. *Patterson*, 102 S.Ct. 1534, 1537 (1982). The relevant statute, 49 USC § 1513(a), reads as follows:

> No state (. . . including the Virgin Islands) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom; . . .

This statute is alleged to pre-empt 33 V.I.C. § 43(a) which reads as follows:

> (a) Every individual and every firm, corporation, and other association doing business in the Virgin Islands shall report their gross receipts and pay a tax of four percent (4%) on the gross receipts of such business . . .

It is evident that 49 U.S.C. § 1513(a) prohibits the Virgin Islands from taxing, directly or indirectly, the sale of air transportation or the gross receipts derived from such sale. The narrow, yet critical, issue, however, is whether the commissions received by a travel agency can properly be classified as gross receipts derived from the sale of air transportation.

This Court will proceed, bearing in mind the well settled rule that statutory exemptions are a matter of legislative grace and as such, are narrowly and strictly construed. *Bingler* v. *Johnson*, 89 S.Ct. 1439, 1445 (1969); *King Christian Enterprises, Inc.* v. *Government*, 5 V.I. 170, 178 (3rd Cir. 1965). The aim of any taxing scheme is to tax activities or events. In this case the activity

sought to be taxed is veiled. On its face, Southerland's activities appear to be protected by § 1513 (a). However, careful scrutiny of its business operations reveals that it performs two activities with one act. It undeniably sells air transportation, and by so doing, it performs a service to airlines for a fee. Both activities, though related, are separate and distinct for tax purposes. The Virgin Islands seek to tax only one—the sale of a service.

Southerland argues that its commissions represent a portion of collected airfares and, therefore, the commissions are part of "gross receipts derived from the sale of air transportation." If this were true, a surtax on the gross salary of airline ticket agents would be prohibited, so long as the agents were paid from the airlines' sales account. Unfortunately, escape from taxation is not that simple. It is interesting to note that the collected airfares, which represent "gross receipts derived from the sale of air transportation," are not the property of Southerland. Surely, Southerland would not report as income, gross receipts which are not theirs. But the unreported gross receipts discovered by the Director came from Southerland's books and records. Thus, shouldn't these receipts represent something else?

It is true that all receipts from the sale of air transportation by Southerland are deposited in a central APR account and that Southerland's commission is paid therefrom. What Southerland fails to recognize, however, is that the character or classification of income for tax purposes, changes depending on its purpose and the parties involved. Southerland admits that the gross receipts which it collects from passengers are the property of the airlines. In this respect, Southerland is merely a conduit for payment of airline tickets. The purpose of the payment is for travel. Accordingly, these receipts represent a transaction between the airlines and its passengers. Such receipts represent the sale of air transportation—the activity sought to be pre-empted by § 1513(a).

The fact that Southerland is paid from the same account in which the gross receipts from the sale of air transportation are deposited is irrelevant. Those receipts are not the property of Southerland. The instant that a portion of those receipts is assigned, or paid to Southerland, the character of that portion is altered. It no longer represents "gross receipts derived from the sale of air transportation." It is now commissions for services rendered. This is so because its purpose is not for travel, but to compensate Southerland for services rendered. The airlines, by paying commissions, surely are not purchasing air transportation. Obviously, this is not a transaction between an airline and a passenger, but rather it is a transaction between an airline and its travel agent. This Court cannot consider this transaction as the activity sought to be pre-empted by § 1513(a). The statute "pre-empts state taxes imposed on or measured by the gross receipts of airlines," not state taxes imposed on travel agencies whose income doesn't represent such receipts. *Aloha Airlines* v. *Director of Taxation of Hawaii*, 104 S.Ct. 291, 295 n.10 (1983).

The cases cited by Southerland in support of its position are inapposite. They involve attempts to tax an airline of its sale of air transportation. Here the Virgin Islands is taxing the sale of a service provided by travel agencies.

This Court's distinction between the sale of air transportation and the sale of services is not unique. The United States District Court in *Salem Transportation Co.* v. *Port Authority of N.Y. & N.J.*, 611 F. Supp. 254, 257 (D.C.N.Y. 1985) distinguished between the activity of carrying passengers in air transportation and that of selling ground transportation services. It said, "Congress passed § 1513(a) to deal primarily with local head taxes on airline passengers. (citations omitted) The section was not passed to prohibit the imposition of fees on ground transportation service." *Id.* at 257. Though these

activities are very much related, the Court recognized their distinction for tax purposes. Similarly, in *Wardair Canada, Inc.* v. *Florida Dept. of Revenue*, 106 S.C. 2369, 2372 (1986), the Supreme Court upheld a tax on an airline for fuel consumed. The Court stated that Congress did not intend to preclude state sales taxation of airline fuel. Thus the Court recognized that an activity, though indispensable to the sale of air transportation or the carriage of persons therein, was nevertheless sufficiently distinct to be taxable.

Congress itself manifested an intent to distinguish between the sale of air transportation and the sale of other goods and services when it enacted § 1514(b). That statute reads as follows:

> Nothing in this section shall prohibit a State (. . . including the Virgin Islands) from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes . . . sales taxes . . . on the sale of goods or services; . . .

Clearly, "sale of goods or services" as used in § 1513(b) is not intended to include the sale of air transportation (i.e. a service). If it did, § 1513(b) would contradict § 1513(a). See *State* v. *Cochise Airlines*, 626 P.2d 596, 601 (Ariz. App. 1980). Thus, Congress itself has made it clear that it is only the sale of a particular service, that being air transportation, that is pre-empted. Related services remain taxable.

It is rather vivid to this Court that the plain language of § 1513(a), strictly construed, does not prohibit the imposition of gross receipts taxes on the commissions earned by travel agencies. This reading becomes even more apparent when one examines the Virgin Islands tax in light of the history and purpose of § 1513(a). In 1970, Congress passed the Airport and Airway Development Act in order to provide for needed improvements in the

national air transportation system. A Trust Fund was established as a conduit to channel federal resources to local airport improvement and expansion projects. See 1973 U.S. Code Cong. & Admin. News, pgs. 1434-1437. The Fund was financed through federal aviation taxes, including a 8% charge on domestic passengers, and a $3 per person charge on international trips. *Id.* at 1450.

In 1972, the Supreme Court upheld passenger head taxes imposed by the states of New Hampshire and Indiana. *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines, Inc.*, 92 S.Ct. 1349 (1972). The decision invited state and local governments to impose similar taxes on air travelers. U.S. Code Cong. & Admin. News, supra, at 1446. Congress later concluded that "the proliferation of local taxes burdened interstate air transportation, and when coupled with the federal Trust Fund review, imposed double taxation on air travelers." *Aloha*, 104 S.Ct. at 293. To rectify this problem, Congress passed 49 USC § 1513(a).

Section 1513(a) was passed "to deal primarily with local head taxes on airline passengers." 104 *S.Ct.*, at 294. It also sought to "pre-empt state taxes on the gross receipts of *airlines*." (Emphasis supplied). *Id.* at 294. Congress was concerned with the increase in airfares which would occur for example, if an airline was taxed on its sales. The airline would simply increase its fares. U.S. Code Cong. & Admin. News, supra, at 1451. Southerland is powerless to pass on gross receipts by increasing airfares. The tax, therefore, is not at odds with the purpose of § 1513(a). Conspicuously absent from the legislative history of § 1513(a) is any intent to pre-empt taxation of travel agencies. The history abounds with references to airlines and air passengers. The activity performed by travel agencies was never mentioned. As the Supreme Court in *Wardair* stated:

> Where a congressional statute does not expressly declare that a state law is to be pre-empted, and

> where there is no actual conflict between what federal and state law prescribe, we have required that there be evidence of a congressional intent to pre-empt the specific field covered by state law.

Wardair, supra, at 2372. No such conflict or congressional intent exists here.

For the foregoing reasons, this Court holds that 49 USC § 1513(a) does not pre-empt the Virgin Islands Gross Receipts Tax Statute with respect to commissions earned by travel agencies. The Government's Motion for Summary Judgment will be granted, and the Plaintiff's Motion for Summary Judgment will be denied.

/s/ Eileen R. Petersen
EILEEN R. PETERSEN
Judge

APPENDIX D

IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS DIVISION OF SAINT CROIX

Civil No. 204/87

ACTION FOR DETERMINATION OF TAX

TRAVEL SERVICES, INC.,
Plaintiff,

vs.

GOVERNMENT OF THE VIRGIN ISLANDS and ANTHONY P. OLIVE, Director of Virgin Islands Bureau of Internal Revenue,
Defendants.

STIPULATION OF FACTS

It is hereby stipulated that, for the purpose of this case, the following statements may be accepted as facts and all exhibits referred to herein and attached hereto and incorporated in this stipulation and made a part hereof; provided, however, that either party may introduce other and further evidence not inconsistent with the facts herein stipulated. Either party hereby expressly reserves the right to object to the admission in evidence of any of the following facts or exhibits, however, on the grounds or materiality and relevancy.

1. Travel Services, Inc. (hereinafter Plaintiff), is a corporation duly organized and exiting under the laws of the United States Virgin Islands.

2. Plaintiff operates a travel agency known as Southerland Tours located at #55 Kings Alley, Christiansted, St. Croix, United States Virgin Islands.

3. Plaintiff's principal place of business is located in Christiansted, St. Croix, United States Virgin Islands.

4. Plaintiff filed its monthly gross receipts tax returns (Form 720 V.I.) for the periods June 1983 through April 1986 with the Virgin Islands Bureau of Internal Revenue at St. Croix.

5. Plaintiff's employer identification number (EIN) is 67-025714.

6. On January 30, 1987, the Director of the Virgin Islands Bureau of Internal Revenue assessed gross receipts taxes and interest on the commissions earned by Plaintiff from the sale of airline tickets for the months of June 1983 through April 1986 in the amounts of $44,377.02 and $10,399.43 respectively.

7. Plaintiff is engaged in business as a travel agency.

8. As a travel agency, Plaintiff's services include providing airline tickets for sale.

9. Plaintiff has an arrangement with certain airline carriers whereby Plaintiff will issue an airline ticket for a customer to his or her place of destination.

10. The price of the airline ticket cannot be lowered or increased by Plaintiff under any circumstances.

11. Plaintiff remits the entire ticket fare to an account in Plaintiff's name from which the airline reporting plan draws checks for all fares less the balance of commission owed which remains in Plaintiff's account.

12. In the sale of tickets, Plaintiff acts as the agent of airline.

13. The fares for airline tickets collected by Plaintiff are not the property of the Plaintiff.

14. Plaintiff holds the collected air fares in trust for the various air carriers.

15. In filing its monthly gross receipts tax returns for the months of June 1983 through April 1986, Plaintiff did not report as gross receipts these amounts earned as commissions from the sale of airline tickets.

16. In examining Plaintiff's monthly gross receipts tax returns, Defendant determined that Plaintiff had excluded from its monthly gross receipts for the months of June 1983 through April 1986, all commissions earned during said periods from the sale of airline tickets.

17. Attached hereto as Exhibit A is a summary of gross receipts and taxes prepared by Revenue Agent Bernadette Williams and corrected by Plaintiff.

DATED:

Government of the
Virgin Islands

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Attorney General

By: /s/ Eddie L. Gibson
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00820
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Dated: 3/14/88

EXHIBIT A

TRAVEL SERVICES, INC.

Gross Receipts

Period	A Per Gross VI	B Tax Paid	C Commission on Ticket Sale	D Total Gross Receipt	Exemption	Rate	Current Gross Receipt Tax	Difference
June 1983	$ 6,849.90	37.00	46,189.00	53,038.90	-0-	2%	1,060.77	1,023.78
July 1983	12,540.56	150.81	35,257.00	47,797.56	-0-	2%	955.95	805.14
Aug. 1983	5,388.94	7.77	46,209.00	51,597.94	-0-	2%	1,031.95	1,024.18
Sept. 1983	4,143.17	-0-	34,233.00	38,376.17	-0-	2%	767.52	767.52
Oct. 1983	11,608.91	132.18	25,284.00	36,892.91	-0-	2%	737.85	605.68
Nov. 1983	6,140.57	31.37	32,779.00	38,919.57	-0-	2.75%	924.33	901.52
Dec. 1983	12,119.25	195.78	39,503.00	51,622.25	-0-	2.75%	1,419.61	1,223.84
Jan. 1984	8,500.00	96.25	25,365.00	33,865.00	-0-	2.75%	931.28	835.03
Feb. 1984	8,836.73	105.51	29,305.00	38,141.73	-0-	2.75%	1,048.89	943.38
March 1984	9,300.00	118.25	33,900.00	43,200.00	-0-	2.75%	1,188.00	1,069.75
April 1984	10,827.74	160.26	38,650.00	49,477.74	-0-	2.75%	1,360.63	1,200.37
May 1984	10,464.59	150.27	36,682.00	47,146.59	-0-	2.75%	1,296.53	1,146.26
June 1984	11,165.53	169.55	50,472.00	61,637.53	-0-	2.75	1,695.03	1,525.48
July 1984	8,077.76	84.63	50,633.00	58,710.76	-0-	2.75%	1,614.54	1,529.91
Aug. 1984	6,121.51	30.84	42,875.00	48,996.51	-0-	2.75%	1,347.40	1,316.56
Sept. 1984	6,654.37	45.50	26,983.00	33,637.37	-0-	2.75%	925.03	879.54
Oct. 1984	4,292.48	-0-	34,878.00	39,170.48	-0-	3%	1,126.14	1,126.14
Nov. 1984	5,496.36	14.89	40,568.00	46,064.36	-0-	3%	1,381.93	1,367.04
Dec. 1984	6,267.63	38.03	48,028.00	54,295.63	-0-	3%	1,628.86	1,590.84
Jan. 1985	5,159.25	4.77	34,490.00	39,649.25	-0-	3%	1,189.47	1,184.70
Feb. 1985	10,073.63	152.21	27,722.00	37,795.63	-0-	3%	1,133.86	981.66
March 1985	4,568.24	-0-	34,878.00	39,446.24	-0-	3%	1,183.38	1,183.38
Apr. 1985	$ 8,572.66	107.18	35,282.00	43,854.66	-0-	3%	1,315.63	1,208.46
May 1985	17,168.75	365.06	46,224.00	63,392.75	-0-	3%	1,901.78	1,536.72
June 1985	11,785.46	202.66	52,377.00	64,132.46	-0-	3%	1,923.97	1,721.31
July 1985	18,613.05	408.39	53,622.00	72,235.05	-0-	3%	2,167.05	1,758.66
Aug. 1985	9,037.27	151.40	53,778.00	62,815.27	-0-	3.75%	2,120.00	1,968.61
Sept. 1985	7,048.61	76.82	29,889.00	36,937.61	-0-	3.75%	1,385.16	1,308.34
Oct. 1985	12,663.77	287.39	34,145.00	46,808.71	-0-	3.75%	1,755.32	1,467.94
Nov. 1985	4,769.57	-0-	41,452.00	46,221.57	-0-	3.75%	1,733.30	1,733.30
Dec. 1985	4,520.07	-0-	43,420.00	47,940.07	-0-	3.75%	1,797.75	1,797.75
Jan. 1986	7,573.08	96.49	33,100.00	40,673.08	-0-	3.75%	1,525.24	1,428.75
Feb. 1986	17,822.61	480.85	27,830.00	45,652.61	-0-	3.75%	1,711.97	1,231.13
Mar. 1986	7,164.38	81.16	37,219.00	44,383.38	-0-	3.75%	1,644.37	1,583.21
Apr. 1986	18,132.82	492.48	42,366.00	50,498.82	-0-	3.75	1,893.70	1,401.22
TOTALS	$319,439.16	$4,467.09	$1,335,587.00	$1,655,026.16			$48,844.19	$44,377.10

/s/ Bernadette C. Williams
BERNADETTE C. WILLIAMS
Internal Revenue Agent

(3)

No. 90-358

Supreme Court, U.S.
FILED
OCT 3
JOSEPH SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

TRAVEL SERVICES, INC.,
Petitioner,

v.

GOVERNMENT OF THE VIRGIN ISLANDS,
ANTHONY P. OLIVE, Director of
VIRGIN ISLANDS BUREAU OF INTERNAL REVENUE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Third Circuit was correct in holding that the Virgin Islands gross receipts tax was not pre-empted by 49 U.S.C. 1513(a)?

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STATUTES

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-358

TRAVEL SERVICES, INC.,
Petitioner,

v.

GOVERNMENT OF THE VIRGIN ISLANDS,
ANTHONY P. OLIVE, Director of
VIRGIN ISLANDS BUREAU OF INTERNAL REVENUE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF IN OPPOSITION

STATUTORY PROVISIONS INVOLVED

33 V.I.C. Section 43(b)

The term "gross receipts" as used in this title shall mean all receipts, cash or accrued, of the taxpayer for services or derived from trade, business, commerce or sales, and the value accruing from the sale of tangible personal property or services, or both, including rentals, fees and other involvements, however designated, without any deduction on account of the cost of the property sold, the cost of materials used, labor cost, royalties, taxes, interest or discount paid, or any other expenses whatsoever.

STATEMENT OF THE CASE

Travel Services, Inc., (hereinafter Travel Services) is operating a travel agency business in the U.S. Virgin Islands. As a travel agency, its *services* include selling airline tickets on behalf of the airline industry. The fares collected by Travel Services for airline tickets are the property of the airlines. The moneys paid to Travel Services by the airlines, from those fares, are commissions for services rendered to the airlines, and are the property of Travel Services. These commissions are included in the gross receipts of Travel Services as payment for services rendered. Those moneys which go to the airlines for the sale of transportation are the airlines' gross receipts for the sale of air transportation, and are not taxed to Travel Services.

In filing its monthly gross receipts tax returns for the months of June 1983 through April 1986, Travel Service did not report as gross receipts the moneys paid to it by the airlines. It did not report the sums it received from the airlines in payment for providing to the airlines the service of selling airline tickets.

In examining Appellant's monthly gross receipts tax returns, the Government of the Virgin Islands (hereinafter Government) determined that Travel Services incorrectly excluded from its income all of the commissions received from the airline industry for services rendered. As a result of this examination, the Government added these commissions to the gross receipts of Travel Services. For the months in issue, Travel Services' received from the airlines a total of $1,655,026.16 as payment for selling the airline tickets.

The Government derives its authority to tax Travel Services' gross receipts (not the airline's gross receipts) from 33 V.I.C. Sections 43(a) and (b), which read as follows:

> "(a) Every individual and every firm, Corporation, and other association doing business in the Virgin Islands shall report *their* gross receipts and pay tax of four percent (4%) on the gross receipts of such business. . . .
>
> (b) The term "gross receipts", as used in this title shall mean *all receipts*, cash or accrued, *of the taxpayer* for *services or* derived from trade, business, commerce or sales, and the value accruing from the sale of tangible personal property or *services*, or both, including rentals, fees and other involvements, *however designated* . . ." (Emphasis supplied).

Travel Services brought an action in the Territorial Court of the Virgin Islands to enjoin the levying and collection of the gross receipts tax, asserting that 49 U.S.C. Section 1513(a) pre-empted the imposition of such a tax. This statute provides in pertinent part:

> "(a) No State (. . . including . . . the Virgin Islands . . .) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom; . . .

The trial court held that the local gross receipts tax was not prohibited by 49 U.S.C. Section 1513(a), and Travel Services appealed this determination to the District Court of the Virgin Islands, Appellate Division, which affirmed the decision of the trial court. Travel Services, thereafter appealed the decision of the District Court of the Virgin Islands, Appellate Division, to the United States Court of Appeals for the Third Circuit. The Court of Appeals for the Third Circuit affirmed the decision of the courts below. The Court of Appeals held that the Virgin Islands tax was a tax on the commissions earned by Travel Services not a tax on the sale of air transportation and, therefore, the Virgin Islands tax was not pre-empted by 49 U.S.C. Section 1513(a).

This petition for a writ of certiorari followed.

SUMMARY OF ARGUMENT

The petition for writ of certiorari is not worthy of further review by this Honorable Court. Contrary to Travel Services' assertions, the decision below does not create an issue of national importance. Rather, the United States Court Appeals for the Third Circuit's interpretation of 49 U.S.C. Sec. 1513(a) is in keeping with prior judicial decisions. The requested expansion of the pre-emption provision found in Sec. 1513(a) goes beyond the intent of the statute, and is thus unwarranted.

The Third Circuit's decision does not conflict with any determinations reached by this Honorable Court or other courts of appeal. In fact, it is readily apparent that the Third Circuit scrupulously adhered to all of the applicable case law when it ruled that the Virgin Islands tax in question was not pre-empted by 49 U.S.C. Sec. 1513(a). This is evinced by a plain reading of the statute in question and associated judicial interpretations.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW RAISES NO ISSUE WORTHY OF REVIEW BY THIS COURT

Travel Services has failed to show that an issue of national importance arises from the decision below, nor has it adequately established that a conflict exists between the ruling issued by the United States Court of Appeals for the Third Circuit and those precedents set forth by this Honorable Court, or those of other courts of appeal. In fact, as will be developed below, the lower courts' determination of this matter raises no issue which necessitates this Honorable Court's intervention. Moreover, all the decisions of the lower court rendered in this case have carefully followed existing adjudications, both courts of appeal and U.S. Supreme Court. As such, the

petition currently before this Honorable Court is unworthy of further review on the merits.

A. The Decision Rendered Below Does Not Create an Issue of National Importance

It is undeniable, as advocated by Petitioner, that Congress, pursuant to the Airport Acceleration Act, moved to limit State taxation of airlines, and thus hold down the costs of air travel. It is this intent which Travel Services argues has been subverted by the decisions rendered below. However, the facts do not bear out this assertion. The parties to this matter stipulated to numerous facts before the Territorial Court of the Virgin Islands. See Petitioner's Appendix, 26a. In particular, paragraph number 10 specifies that "[t]he price of the airline ticket cannot be lowered or increased by Plaintiff *under any circumstances.*" *Id.* (emphasis added). As the price of airline tickets cannot be changed by Travel Services, a tax which is levied against a travel agent, which may raise *its* cost of doing business, cannot directly or indirectly raise air ticket prices. There has been absolutely no factual link established between a potential rise in travel agents' costs and a subsequent increase in airfares. Absent a showing that an increase in the cost of doing business as a travel agent raises the price of airline tickets, either directly or indirectly, Travel Services' case is not of national importance.

Petitioner relies upon its contention that the tax in question will inevitably result in higher airline ticket prices as grounds for its petition. This alleged result is the special and important reason proffered to this Honorable Court to justify its petition for the writ of certiorari. Clearly, the fact stipulated to by both parties to this matter contradicts the argument raised by Petitioner. The tax imposed on the commission earned by Travel Services has no greater impact on the cost of air transporta-

tion than an increase in the cost of any other item which goes into Travel Services' operating expenses.

Clearly, an extension of the pre-emption of taxes set forth in 49 U.S.C. 1513(a) was not envisioned by Congress to this extreme. While Travel Services argues that the Third Circuit's construction of 49 U.S.C. Sec. 1513(a) is narrow and without precedence, the truth is that its requested expansion of this section is beyond the bounds previously granted by courts. Otherwise, governments will be prevented from raising utility rates, rents, property taxes, or any other cost associated with engaging in the business of providing travel agent services within its jurisdiction.

The essential question in this matter is whether the taxation of the income received by a travel agent for providing a service to airlines is pre-empted by 49 U.S.C. Sec. 1513 (a). Petitioner has obfuscated the facts of this case by insisting that the Government has taxed the monies received from the sale of an airline ticket to the passenger. The reality is that the funds taxed, are those representing the commission paid by the airlines to the travel agent. Only the travel agent's gross income is being taxed.

It is readily apparent that Travel Services' petition does not actually raise an issue of national importance. While Counsel alleges that the tax levied by the Government of the Virgin Islands will increase the cost of air transportation, absolutely no proof of this allegation was provided to the court. The tax in question is assessed against the commission received by Travel Services, it is not charged against the sale of the airline ticket. As such, the decision of the United States Court of Appeals for the Third Circuit did not narrowly interpret 49 U.S.C. Sec. 1513(a).

B. The Decision Below Does Not Conflict with the Rulings of Other Courts of Appeal or This Honorable Court

This Honorable Court has stated:

> ". . . we have consistently emphasized that the first and fundamental inquiry in any pre-emption analysis is whether Congress intended to displace state law, and where a congressional statute does not expressly declare that state law is pre-empted, and there is no actual conflict between what federal and state law prescribe, we have required that there be evidence of a congressional intent to pre-empt the specific field covered by law." *Wardair Canada, Inc. v. Florida Dep't of Revenue*, 477 U.S. 1, 6 (1986); citing *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190 (1983); *Silkwood v. Kerr-McGee*, 464 U.S. 238 (1984).

This syllogism was religiously followed by the Third Circuit. It analyzed the taxable event in question and decided that it is *not* expressly pre-empted. See also *Colorado Anti-Discrimination Commission v. Continental Air Lines*, 372 U.S. 714 (1963). Furthermore, Travel Services failed to establish that Congress somehow intended to pre-empt this field of taxation. In fact, Petitioner never proffered evidence, to any court, that Congress considered the taxation of travel agent commissions, received from the airlines, to be pre-empted by 49 U.S.C. Sec. 1513(a). Therefore, absent the evidence required to issue a ruling otherwise, the Third Circuit refused to find that the Virgin Islands tax was pre-empted.

The Third Circuit's ruling carefully followed the existing body of law governing the statute in question. This is supported by reviewing this Honorable Court's holdings in *Aloha Airlines, Inc. v. Dir. of Taxation of Hawaii*, 464 U.S. 7 (1983); *Wardair Canada, supra; Western Air Lines v. Board of Equalization of S.D.*, 480 U.S. 123 (1987). The *Aloha* Court struck down certain taxes

levied against airlines even though the tax purported to fall outside those pre-empted by Sec. 1513(a). Travel Services maintains that application of the *Aloha* decision disallows the implementation of the Virgin Islands tax, which is argued to be explicitly pre-empted by 49 U.S.C. Sec. 1513(a).

Aloha, however, is easily distinguished from the case at bar. In *Aloha* the tax in question was classified as a property tax. The level of taxation was then tied to the gross income of the airline. The *Aloha* Court pointed out that "Senator Cannon, one of the ADAA's sponsors, clearly stated in floor debate: 'The bill prohibits the levying of state or local head taxes, fees, gross receipts taxes . . . on the carriage of such passengers in interstate commerce.'" *Id.* at 13. With this in mind, the Court held that "[t]he manner in which the state legislature has described and categorized [the tax] cannot mask the fact that the purpose and effect of the provision is to impose a levy upon the gross receipts of airlines." *Id.* at 13, 14. See also *Western Air Lines v. Board of Equalization of S.D.*, 480 U.S. 123 (1987). Petitioner, Travel Services, thus argues that the purpose of the Virgin Islands gross receipts tax, 33 V.I.C. Sec. 43(a) & (b), as applied to its business activities, has the purpose and effect of taxing the gross receipts of the airlines to which it provides a service. This allegation is erroneous, unsubstantiated by fact, and not supported by existing case law.

The United States District Court of the Virgin Islands, Division of St. Croix, has characterized the Government's gross receipts tax in the following manner:

> ". . . . I find that the bulk of authority holds that, where there is no concomitant sales tax, a gross receipts tax is quite similar to a sales tax. (citations omitted). The similarity is, of course enhanced when, as in the Virgin Islands, the gross receipts tax is a general, across-the-board tax rather than a limited,

special one. *Johnson v. I.B.M. Corp.*, 10 V.I. 294, 298 (D.C.V.I. 1973).

The District Court's holding has provided us with the purpose and effect of the Virgin Islands gross receipts tax; namely, to tax the sale of goods and services. When this analysis is wedded to the fact that the tax was *only* applied to the commissions received by Travel Services, the obvious conclusion is that the purpose and effect of the taxation, is to tax the *sale* of the service provided by travel agents to airlines. This configuration is neither expressly, nor impliedly pre-empted by Sec. 1513(a), according to a clear reading of the statute and judicial interpretations of it. As was pointed out by the Territorial Court, when the exchange of service for commissions occurs between the airlines and travel agents, "[t]he airlines, by paying commissions, surely are not purchasing air transportation." *Travel Services, Inc. v. Government of the Virgin Islands*, Civil No. 204/87, slip op., (V.I. Terr. Ct., STX Div., June 23, 1988). Petitioner's appendix at 21a.

It is important to note at this stage that the Petitioner has incorrectly interpreted the meaning of the court in *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 889 F.2d 751 (7th Cir. 1989), *cert. denied*, 110 S.Ct. 1948 (1990). It is true, as Travel Services states, that the court found the service provided by a travel agent to an airline creates an agency relationship. However, this was limited when the Court said "[t]ravel service operators are 'agents' *for purposes of antitrust law* when they sell tickets for air carrier's accounts." *Id.* at 753. (emphasis added). This holding prevents an application of this rationale to the case at bar. The *Illinois* analysis was specifically limited by the court to the marriage of antitrust law and agency relationships. There has been no extension of this decision to non-antitrust law cases. Clearly, the utilization of *Illinois Corporate Travel* for the illumination of Sec. 1513(a)'s intent is unfounded.

Thus, it is obvious that the United States Court of Appeals for the Third Circuit has carefully followed existing case law. This Honorable Court has provided clear guidance on what taxes are expressly pre-empted, as well as how to decide if other taxes are pre-empted by implication. The Third Circuit did not deviate from these directions at all. Rather, Travel Services is requesting that this Honorable Court change its existing analysis of 49 U.S.C. Sec. 1513(a) & (b), and strike down the Virgin Islands gross receipts tax as applied to travel agents' commissions. A result of this nature would unreasonably digress from the direction provided by Congress. As such, Travel Services' petition for writ of certiorari should be denied.

CONCLUSION

Travel Services' petition for writ of certiorari is unworthy of further review by this Honorable Court. The petition alleges that the holding promulgated by the United States Court of Appeals for the Third Circuit incorrectly interpreted the statute, and thus creates an issue of national importance. Rather, Travel Services' arguments, if adopted, would create an issue of national importance. The requested expansion of the pre-emption provision found in Sec. 1513(a) is unwarranted, as it goes beyond the intent of the statute.

Moreover, there is no merit to the argument that the Third Circuit deviated from existing judicial interpretations of the statute in question. A careful reading of the decision below, clearly establishes that the analysis employed exactly mirrors the reasoning of this Honorable Court, and other circuit courts of appeal. Again, Travel Services' argument, if adopted, would create, rather than obviate, the problems alleged to have been created by the Third Circuit's holding. Therefore, the Government of the Virgin Islands, for the reasons stated above, hereby

respectfully prays that this Honorable Court deny the petition for writ of certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

TRAVEL SERVICES, INC.,
Petitioner,

v.

GOVERNMENT OF THE VIRGIN ISLANDS,
ANTHONY P. OLIVE, Director, Virgin Islands
Bureau of Internal Revenue,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF AMICI CURIAE AMERICAN SOCIETY OF TRAVEL AGENTS, HAWAII CHAPTER, AND THIRTY-TWO HAWAII TRAVEL AGENTS IN SUPPORT OF THE PETITION

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Air Transport Association, *Air Transport 1990—The Annual Report of the U.S. Scheduled Airline Industry* (June 1990)	11
Air Transport Association, *The Airline Handbook* (September 1988)	4, 6, 9

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American Society of Travel Agents, *Travel Agency Survey Results* (February 1987) 2
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GOVERNMENT OF THE VIRGIN ISLANDS,
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BRIEF OF AMICI CURIAE AMERICAN SOCIETY OF TRAVEL AGENTS, HAWAII CHAPTER, AND THIRTY-TWO HAWAII TRAVEL AGENTS IN SUPPORT OF THE PETITION

STATEMENT REGARDING CONSENT OF THE PARTIES TO THE FILING OF THE BRIEF OF THE AMICI CURIAE

This brief in support of the Petition of Travel Agents, Inc., for a Writ of Certiorari is submitted with the written consent of counsel for both parties. The written consent of counsel is being filed with the Clerk of the Court contemporaneously with this brief.

INTEREST OF THE AMICI CURIAE

Amicus Curiae, American Society of Travel Agents, Hawaii Chapter, is the largest association of travel agents in the State of Hawaii. The tour and travel industry, of which the travel agent community is an essential part, represents the largest sector of the economy of the State of Hawaii,[1] and the sale of air transportation accounts for almost two-thirds of travel agents' total sales.[2]

The decision of the Court of Appeals involves the pre-emptive effect of 49 U.S.C. § 1513(a) on State and local taxation of the "sale of air transportation".[3] More specifically, the issue presented by the Petition is whether, contrary to the decision of the Court of Appeals, 49 U.S.C. § 1513(a) prohibits the Virgin Islands from levying and collecting from a travel agent a so-called "gross receipts" tax measured against the portion of the proceeds from the "sale of air transportation" comprising the travel agent's gross commission income. Hawaii levies a so-called "General Excise Tax" or "privilege" tax against the gross receipts of all persons (and entities) engaged in business in the State. Haw. Rev. Stat. Chapter 237 (General Excise Tax Law); Haw. Rev. Stat. §§ 237-3, 237-13. The Hawaii general excise tax operates in a fashion similar to the Virgin Islands tax in issue in the case before the Court, and, although questions previously have been raised about the constitutionality of the Hawaii tax in light of the pre-emptive effect of 49 U.S.C. § 1513(a), the Hawaii State tax officials currently assess the Hawaii State general excise tax upon sales of air

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[1] Dept. of Business and Economic Development, *State of Hawaii Data Book—1989*, 336 (November 1989).

[2] American Society of Travel Agents, *Travel Agency Survey Results* (February 1987).

[3] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Court of Appeals had jurisdiction under 28 U.S.C. §§ 1291 and 1294 and 48 U.S.C. § 1613a(c). The District Court had jurisdiction under 48 U.S.C. §§ 1613a(a) and (b).

transportation made by travel agents measured by the gross receipts of the travel agents derived therefrom. As a consequence, the issue before the Court is one of major importance to the members of Amicus Curiae American Society of Travel Agents, Hawaii Chapter.

This brief is also being filed on behalf of thirty-two (32) individual Hawaii travel agents [4] who have or are in the process of making refund claims in respect of Hawaii State general excise taxes that were imposed and collected by the State of Hawaii from the travel agents on the gross proceeds derived by them from the sale of airline tickets. The issue presented by the Petition is also of central importance to the refund claims of these individual travel agents. Given the functional similarity between the Virgin Islands and Hawaii taxes, and the demonstrated tendency of the Hawaii courts to protect the Hawaii general excise tax,[5] the decision of the Court of Appeals, if left standing, would no doubt be embraced and followed by the Hawaii courts—and the issue of the pre-emptive effect of 49 U.S.C. § 1513(a) would most likely resurface again before the Court.

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[4] The individual travel agents who have joined the American Society of Travel Agents, Hawaii Chapter, as Amici Curiae are: A-1 Travel Services, Inc.; All About Travel; AMI Travel and Tours, Inc.; Associated Travel, Inc.; Atlantic & Pacific Travel; Bel Air Travel, Ltd.; Carl Erdman Travel; Casey & Lee Travel, Inc.; Cosmopolitan Travel, Inc.; Four Seasons Travel; Hawaii Kai Travel, Inc.; Hawaiian Pacific Travel, Ltd.; HHCL Corp. dba Jet Set World Travel; High Point Travel; HNL Travel Associates; Honolulu Club Travel; International Travel Service; Kauai Travel Service; Lahaina Travel; Momentum Travel; Murdock Travel; NTA Travel; Phillips Travel; Polo Tours International, Inc.; Ramsay Travel, Inc., dba Liberty House Travel Center; Thomas Cook Travel; Travel, Inc.; Travel Partners, Inc.; Travelers Choice, Inc.; Trips, Inc.; Universal Tour & Travel Service, Inc.; and Waikiki World Travel, Inc.

[5] *See Aloha Airlines, Inc. v. Director of Taxation*, 464 U.S. 7, 11-12 (1983).

REASONS FOR GRANTING THE WRIT

The travel agency industry, consisting of more than 35,000 travel agency locations nationwide, accounts for over 85% of all domestic airline ticket sales or approximately $45 billion annually.[6] The decision of the Court of Appeals (Pet. App. 1a-8a) subjecting travel agents to State and local taxation on the sale of airline tickets does substantial violence to 49 U.S.C. § 1513(a), which specifically prohibits State and local taxation on the "sale of air transportation" and gross receipts derived therefrom. By effectively limiting this statutory pre-emption to airlines, which are otherwise protected by the proscription in 49 U.S.C. § 1513(a) against State and local taxation on the "carriage of persons traveling in air commerce", the decision below renders part of the statute (the prohibition on taxation on the sale of air transportation) a nullity. In the process, the decision of the Court of Appeals, contrary to the specific intent of the Congress, exposes a major component of the air transportation industry to State and local taxation and the economic disruption associated therewith.

1. The Court of Appeals failed to recognize that, in enacting 49 U.S.C. § 1513(a),[7] the Congress specified *three* separate segments of the interstate air transportation system that were to be absolutely immune from State and local gross receipts taxes. In this respect, the statute speaks for itself:

> § 1513. State taxation of air commerce
>
> (a) No State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the

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[6] U.S. Travel Data Center, *The 1989-90 Economic Review of Travel in America*, 22-24, A-4 (August 1990). See Air Transport Association, *The Airline Handbook*, 30-31 (September 1988).

[7] 49 U.S.C. § 1513 is a codification of Section 7(a) of the Airport Development Acceleration Act of 1973, Pub. L. 93-44, 87 Stat. 90.

> territories or possessions of the United States or political agencies of two or more States) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on *persons traveling in air commerce*, or on *the carriage of persons traveling in air commerce* or on *the sale of air transportation* or on the gross receipts derived therefrom; . . . .

(Emphasis added.)[8] This pre-emption statute quite simply prohibits State and local excise and gross receipts taxes on three specified categories of taxpayers and activities within the air transportation industry—that is, passengers traveling in air commerce, airline carriers, and the sale of air transportation. *See, generally, Aloha Airlines, Inc. v. Department of Taxation*, 464 U.S. 7 (1983).

Until the decision below, the lower courts have not had any difficulty understanding and applying 49 U.S.C. § 1513(a) with respect to the three protected categories to which the statute is addressed.

Thus, the lower courts have understood that the proscription against the State or local taxation of "persons traveling in air commerce" precludes State and local governments from imposing head taxes or other similar taxes on airline *passengers. See, e.g., Allegheny Airlines, Inc. v. City of Philadelphia*, 453 Pa. 181, 309 A.2d 157

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[8] The Petition (at 2) regrettably misquotes 49 U.S.C. § 1513(a) by omitting the language pre-empting any State or local taxation imposed on "the carriage of persons traveling in air commerce". As discussed, *infra*, the function of the omitted language is to insulate *airlines* from State and local taxation of air commerce. The central misconception in the opinion of the Court of Appeals is in treating the separate proscription against State and local gross receipts taxes on the "sale of air transportation" as *also* limited to the taxation of airlines—as opposed to travel agents which account for over 85% of all airline ticket sales. This misconception, in turn, creates an unintended redundancy in the statute and erroneously renders a nullity the part of the statute pre-empting the State and local taxation of the "sale of air transportation".

(1973). Similarly, as the Court of Appeals for the First Circuit has pointed out, the language in 49 U.S.C. § 1513(a), which pre-empts State and local taxation on the "carriage of persons" traveling in air commerce, is meant to insulate *airlines* from State and local gross receipts taxes relating to the air transportation of passengers. *Interface Group, Inc. v. Massachusetts Port Authority*, 816 F.2d 9, 16 (1st Cir. 1987).[9]

The third market segment that the Congress determined ought to be protected against State and local taxation was the "sale of air transportation"—an activity dominated by *travel agents* and the travel agency industry and *not* the airlines.[10] By treating the proscription against State or local taxation on the "sale of air trans-

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[9] The speculation in *State of Arizona ex rel., Department of Revenue v. Cochise Airlines*, 128 Ariz. 432, 436, 626 P.2d 596, 600 (Ariz. App. 1981), that the language relating to the "carriage of persons traveling in air commerce" might have been added to the statute as a ban on the "taxation of *intrastate* airline fares", finds no support in the legislative history and would seem to be refuted by the language of the statute. The Federal Aviation Act of 1958, Pub. L. 85-726, 72 Stat. 737, which is codified as 49 U.S.C. §§ 1301 *et seq.*, and to which 49 U.S.C. § 1513(a) was appended as part of the Airport Development Acceleration Act of 1973, Pub. L. 93-44, Sec. 7(a), 87 Stat. 90, specifically defines the terms "air commerce" and "air transportation" as meaning "interstate, overseas, or foreign" air commerce and air transportation, respectively. 49 U.S.C. §§ 1301(4) and (10). Therefore, the term "carriage of persons traveling in *air commerce*" (emphasis added) is, by statutory definition, an "interstate" concept. The Congress, however, understood that the United States air transportation system is a national network of which all aspects and routes, including intrastate flights, are intrinsically a part of interstate commerce, and, as a consequence, subject to the pre-emptive effect of 49 U.S.C. § 1513(a). *Cf.* S. Rept. No. 93-12, 93d Cong., 1st Sess., 1973 U.S. Code Cong. & Admin. News 1434, 1446-1454.

[10] U.S. Travel Data Center, *The 1989-90 Economic Review of Travel in America, supra*, 22-24, A-4. See Air Transport Association, *The Airline Handbook, supra*, 30-31.

portation" as limited to airlines, which are already exempted by the prohibition against State and local taxation on the "carriage of persons" traveling in air commerce, the decision of the Court of Appeals creates a redundancy in the statute that the Congress could not have intended. To the contrary, in similar situations, the Court has stated that it is an " 'elementary canon of construction that a statute should be interpreted so as not to render one part inoperative' ". *Mountain States Telegraph & Telephone Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985), quoting *Colautti v. Franklin*, 439 U.S. 379, 392 (1979). See *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979). Furthermore, in *Aloha Airlines, Inc. v. Director of Taxation*, *supra*, 464 U.S. at 11-12, the Court has specifically ruled that, when the "plain language" of 49 U.S.C. § 1513(a) "expressly pre-empts" the State and local taxation of a component of the air transportation industry, the "courts need not look beyond the plain language of the federal statute to determine whether the State statute that imposes a tax is preempted."

2. The decisional law background and legislative history of 49 U.S.C. § 1513 demonstrate that the court below failed to recognize and abide by the controlling congressional determination that State and local gross receipts taxes on the "sale of air transportation" by travel agents are absolutely and *per se* prohibited. As the Court had occasion to review in *Aloha Airlines, Inc. v. Director of Taxation*, *supra*, 464 U.S. at 8-10, the statute represents a decision by the Congress to prevent by preemption a "Balkanization" [11] in the taxation of certain

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[11] The legislative history of 49 U.S.C. § 1513(a) indicates that the Congress was concerned about the "inequitable" and "potentially chaotic burden" that a "hodgepodge of Balkanized assessments" would impose on the air transportation industry if the Congress did not pre-empt State and local taxation of the essential components

segments of the air transportation industry that might otherwise have followed from the Court's decision in *Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972).

In 1970, as part of its commitment to give Federal support to expanding and improving the Nation's air transportation system, the Congress passed the Airport and Airway Development Act of 1970.[12] To underwrite the cost of this Federal support, the Congress also established the Airport and Airway Trust Fund that was to be funded by several new Federal transportation excise taxes on passengers and air freight.[13] *See, generally, Aloha Airlines, Inc. v. Director of Taxation, supra*, 464 U.S. at 8-10. The question then arose whether, in light of these Federal developments and new Federal taxes, the State and local governments were still free to impose additional taxes of their own on the air transportation industry and its customers. In *Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc., supra*, the Court ruled that neither the Commerce Clause nor the

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of the air transportation system. *See* 119 Cong. Record, Pt. 3, 3349 (Remarks of Senator Cannon), 3349-3350 (Remarks of Senator Pearson). *See* S. Rept. No. 93-12, 93d Cong., *supra*, 1973 U.S. Code Cong. & Admin. News at 1446-1451.

[12] Pub. L. 91-258, 84 Stat. 219.

[13] The Federal transportation excise taxes are now codified, as amended, as Sections 4261 *et seq.* (dealing with the taxation of the transportation of passengers) and Sections 4271 *et seq.* (dealing with the taxation of the transportation of property) of the Internal Revenue Code of 1986 (26 U.S.C.). These provisions impose an 8% excise tax on domestic airline passenger tickets, a $3 head tax on international flights originating in the United States, and a 5% excise tax on air freight. The taxes are assessed against the *passenger* (or air freight *user*), and simply collected by the airlines and accounted for and paid over by the airlines to the Internal Revenue Service. Sec. 4291, Internal Revenue Code of 1986 (26 U.S.C.). *See* Sec. 7501, Internal Revenue Code of 1986 (26 U.S.C.).

Airport and Airway Development Act of 1970 precluded State and local taxation in this area. The Court, however, left the door open for the Congress to pre-empt State and local taxation if it determined to do so. Fearing a chaotic proliferation of local taxes and the resulting burden on interstate commerce from multiple layers of taxation, the Congress did just that by enacting the pre-emption provision that is now codified as 49 U.S.C. § 1513. *See* S. Rept. No. 93-12, 93d Cong., 1st Sess., 1973 U.S. Code Cong. & Admin. News 1434, 1446-1454; H. Conf. Rept. 93-225, 93d Cong., 1st Sess., 1973 U.S. Code Cong. & Admin. News 1458.

Given the manner in which air transportation is marketed, it is not surprising that the Congress sought to prohibit State and local gross receipts taxes on the "sale of air transportation" as well as passengers and carriers. The 35,000 travel agency locations in the United States that comprise the travel agency industry account for over 85% of *all* domestic airline tickets sales. In 1989, the domestic airline industry reported approximately $53.4 billion in total airline passenger revenues. U.S. Travel Data Center, *The 1989-90 Economic Review of Travel in America*, Table 2D at A-4 (August 1990). Of this amount, the travel agency industry accounted for about $45.6 billion in total ticket sales. *Ibid. See* Air Transport Association, *The Airline Handbook* 30-31 (September 1988). Since the announced purpose of the Congress was to immunize the major components of the air transportation system from a chaotic system of State and local head taxes and gross receipts taxes that would be imposed on top of the Federal transportation excise taxes enacted in 1970, it would have been incomprehensible for the Congress to have omitted the sale of air transporation by travel agents from the pre-emptive effect of 49 U.S.C. § 1513(a). By the same token, by exposing this essential and integral component of the air transportation system to multiple layers of State and local taxation, the decision

below opens the door to substantial uncertainty, inconsistency, and disruption in the economic structure of the air transportation industry.

The Committee Reports reflect that the Congress understood that, wherever the incidence of State and local taxation fell in the first instance, the tax would ultimately be passed on to the consumer who was already bearing the burden of the Federal transportation excise taxes enacted by the Congress. *See* S. Rept. No. 93-12, *supra*, 1973 U.S. Code Cong. & Admin. News at 1451. *Cf. Interface Group, Inc. v. Massachusetts Port Authority*, *supra*, 816 F.2d at 16. This is no less true of State and local taxes imposed on the "sale of air transportation" by travel agents, even if the tax is measured against (as in this case) the travel agents' portion of the gross proceeds derived from such sales. Of the 50 States and the District of Columbia, all but five have some form of sales or gross receipts tax, and the rates are generally higher than the 4% rate of the Virgin Islands tax in issue in this case.[14] If each extended their sales or general excise tax to cover the sale of air transportation by travel agents, as the decision below would allow, the resulting tax, even if measured against or limited to the gross receipts derived therefrom by travel agents, would equal the total *aggregate* profits realized by *all* domestic airlines in 1989.[15] It is inconceivable that this magnitude

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[14] Advisory Commission on Intergovernmental Relations, *Significant Features of Fiscal Federalism*, Vol. 1 (Budget Processes and Tax Systems) 70-74 (January 1990). In addition to State sales taxes, there are also numerous local governments with sales taxes. *Ibid.* at 76-77.

[15] The travel agent's share or commission on airline ticket sales is generally 10 percent. *See, generally, Illinois Corporate Travel v. American Airlines, Inc.*, 806 F.2d 722, 724 et seq. (7th Cir. 1986). In 1989, on total sales of air transportation of $45.6 billion by the travel agency industry, travel agents would have earned about $4.56 billion. If other State and local governments extended their sales and general excise taxes, as the decision below condones, to cover the amounts received by travel agents from the sale of air

of tax would not ultimately be passed on to airline passengers—the precise result that the Congress sought to avoid.

As envisioned by the Congress, the provision that became 49 U.S.C. § 1513(a) was to be a "*permanent prohibition.*" (Emphasis added.) H. Conf. Rept. 93-225, *supra*, 1973 U.S. Code Cong. & Admin. News at 1458. Section 1513(a) represents a legislative determination by the Congress that State and local taxation of passengers, carriers, and those involved in the "sale of air transportation" would pose an inequitable and potentially chaotic burden on interstate commerce. *See* S. Rept. No. 93-12, *supra*, 1973 U.S. Code Cong. & Admin. News at 1446. *Cf. Aloha Airlines, Inc. v. Director of Taxation*, *supra*, 464 U.S. at 11-12. By condoning the Virgin Islands tax in issue in this case, the decision of the Court of Appeals literally reopens a door that the Congress sought to shut permanently when it enacted the preemption provision of 49 U.S.C. § 1513(a). *See* H. Conf. Rept. 93-225, *supra*, 1973 U.S. Code Cong. & Admin. News at 1458. Moreover, the decision below, in effect, second-guesses the legislative determination made by the Congress that, along with passengers and carriers, the "sale of air transportation" should also be absolutely immune from State and local gross receipts taxes.

3. The approach of the Court of Appeals that 49 U.S.C. § 1513(b) should be read as a "limit[ation]" on the "broad sweep of § 1513(a)" (Pet. App. 5a) literally turns the statute on its head. Furthermore, contrary to the view expressed in the opinion below, the Court's decision in *Wardair Canada, Inc. v. Florida Dept. of Reve-*

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transportation, the amount of tax collected would approximate, if not exceed, the $189,948,000 in aggregate net profits reported by *all* United States scheduled airlines for 1989. *See* Air Transport Association, *Air Transport 1990—The Annual Report of the U.S. Scheduled Airline Industry* 4, 19 (June 1990).

nue, 477 U.S. 1 (1986), does not support any such statutory inversion.

As the Court stated explicitly in the *Aloha Airlines* [16] case, and implicitly acknowledged in *Wardair Canada*, Section 1513(a) "enumerate[s]" the specific categories of State and local taxes that are absolutely prohibited. *Ibid.* at 7-8. Section 1513(b), on the other hand, outlines the "other" types of taxes and user fees that might still be permissible. *See* H. Conf. Rept. 93-225, *supra*, 1973 U.S. Code Cong. & Admin. News at 1458.

The Congress did not intend to have Section 1513(b) function as an exception or limitation on Section 1513(a), but as a clarification of the areas to which the prohibition of Section 1513(a) "would not extend". *Ibid.* This is clear from the language of the statute:

> § 1513. State taxation of air commerce
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> * * *
>
> (b) Except as provided in subsection (d) of this section, nothing in this section shall prohibit a State (or political subdivision thereof, . . .) from the levy or collection of taxes *other than those enumerated in subsection (a) of this section*, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; and nothting in this section shall prohibit a State (or political subdivision thereof . . .) owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

(Emphasis added.) As Section 1513(b) itself acknowledges, the State and local governments are simply prohibited, notwithstanding the provisions of subsection (b), from levying or collecting any of the taxes "enumerated

[16] 464 U.S. at 12 (fn. 6).

in subsection (a)", including specifically gross receipts taxes on the "sale of air transportation". *See Aloha Airlines, Inc. v. Director of Taxation, supra,* 464 U.S. at 12 (fn 6).

The legislative materials suggest that, in adding subsection (b) to the statute, the Congress simply wanted to clarify that the State and local governments were still free to impose reasonable and non-discriminatory taxes, other than those enumerated in subsection (a), on the air transportation industry and the support and peripheral industries that happened to be doing business with the air transportation industry, and, in the State or local government's capacity as the owner and operator of an airport facility, to charge airlines reasonable and non-discriminatory user fees. *Ibid. See, generally, Wardair Canada, Inc. v. Florida Dept. of Revenue, supra,* at 16 (Burger, C. J., concurring). And subsection (b) has been so applied. *See,* e.g., *Wardair Canada, Inc. v. Florida Dept. of Revenue, supra,* (aviation fuel tax upheld); *Air Jamaica, Ltd. v. State Dept. of Revenue,* 374 So. 2d 575 (Fla. App. 1979), *cert. denied,* 392 So. 2d 1371 (1980) (tax on packaged meals sold to passengers upheld). *Cf. Salem Transportation Co. v. Port Authority of New Jersey,* 611 F. Supp. 254 (S.D.N.Y. 1985) (tax on ground transportation upheld as not pre-empted by 49 U.S.C. § 1513(a)).

The Court of Appeals was, therefore, simply wrong in treating subsection (b) as creating an exemption from the pre-emptive effect of 49 U.S.C. § 1513(a). As the court said in *State of Arizona ex rel., Department of Revenue v. Cochise Airlines,* 128 Ariz. 432, 437, 626 P.2d 596, 601 (Ariz. App. 1981):

> . . . [T]he "sales taxes" referred to in § 1513(b) on the "sale of goods or services" *cannot logically include sales of air transportation or sales directly connected with the carriage of persons in air com-*

> *merce.* If § 1513 as a whole were interpreted otherwise, it would be self-contradictory.

(Emphasis added.)

Furthermore, the rationale given by the Court of Appeals for reading subsection (b) as a limitation on subsection (a) is grounded in a totally mistaken premise. According to the Court of Appeals, if subsection (b) were not read as a limitation on the pre-emptive effect of 49 U.S.C. § 1513(a), "every item paid from an airline's gross receipts, such as an airline's direct purchase of goods or services or an airline's employee's wages, would be exempt from taxation." (Pet. App. 5a.) However, an airline's purchase of packaged meals, fuel, and other similar goods and services, as well as the payment of employee wages, does not involve the "sale of air transportation"—a segment of the national air transportation system dominated by travel agents and immunized from State and local taxation by the "plain language" of 49 U.S.C. § 1513(a).

To read subsection (b), as the Court of Appeals did, to permit State and local governments to tax the gross income of travel agents derived from the "sale of air transportation" contradicts the specific language of the statute and, in effect, allows the exception to swallow up the rule.[17]

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[17] The conclusion that 49 U.S.C. § 1513(a) specifies certain categories of State and local taxation that are *absolutely* or *per se* pre-empted is unavoidable when 49 U.S.C. § 1513 is compared with 49 U.S.C. §§ 11503(a) and (b). 49 U.S.C. § 11503(a) and (b) are the cognate provisions of the Revised Interstate Commerce Act, Pub. L. 95-473, 92 Stat. 1445, that contemplate the pre-emption of certain State and local taxes that unreasonably burden and discriminate against interstate *rail* transportation.

In 1982, the Congress amended 49 U.S.C. 1513(b) and added new subsection (d) to 49 U.S.C. § 1513 to specify that the permissible types of State and local taxes referenced in subparagraph (b) were still subject to a general limitation that any such taxes could not unreasonably burden or discriminate against interstate

4. Finally, in order to avoid the pre-emptive effect of 49 U.S.C. § 1513(a), the Court of Appeals characterizes the Virgin Islands tax as a tax on the "commissions earned by a travel agent for providing services" and not on the sale of air transportation. As the Court pointed out in another context, however, "this is a bit of verbal logic from which the meaning of things has evaporated." *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 191 (1941).

In the first place, as the Court reiterated in *Western Air Lines, Inc. v. Board of Equalization of South Dakota*, 480 U.S. 123, 129-130 (1987), a state legislature's characterization" of a tax cannot shield the tax if it is preempted by 49 U.S.C. § 1513(a). *See Aloha Airlines, Inc. v. Director of Taxation, supra*, 464 U.S. at 13-14. The statute by its terms pre-empts State and local taxation "directly or indirectly . . . on the sale of air transportation or on the gross receipts derived therefrom." Since the travel agency industry accounts for over 85% of all airline ticket sales, travel agents are, for all intents and

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air transportation. Pub. L. 97-248, Title V, § 532, 96 Stat. 701. 49 U.S.C. § 1513(d) is literally the mirror image or air transportation version of 49 U.S.C. §§ 11503(a) and (b), the provisions dealing with rail transportation. Both sets of provisions contemplate a "balancing test" to determine whether a State or local tax unreasonably burdens or discriminates against interstate transportation in the market segments covered by each respective statute. *Cf. Western Air Lines, Inc. v. Hughes County*, 372 N.W.2d 106 (S.D. 1985), *aff'd*, 480 U.S. 123 (1987).

There is no parallel or equivalent of the absolute pre-emption provision of 49 U.S.C. § 1513(a) in the rail transportation statute. Furthermore, the absolute proscription of 49 U.S.C. § 1513(a) is not subject to any "balancing test" respecting the burden on interstate commerce or the discriminatory effect of a State or local tax. To the contrary, 49 U.S.C. § 1513(a) represents the legislative determination of the Congress that the State and local taxation of passengers, carriers, and the sale of air transportation unduly burdens air commerce and is *absolutely* pre-empted. This is not a matter that the Congress left open to the courts.

purposes, the mechanism for the "sale of air transportation".

Additionally, besides being involved in the sale of air transportation on behalf of the airlines, the travel agency industry has "increasingly" engaged in the practice of buying "seats" for resale. *See Illinois Corporate Travel v. American Airlines, Inc.*, 806 F.2d 722, 725 (7th Cir. 1986). This is a common practice among the members of the Amici Curiae, who often acquire (and take into inventory) airline coupons which they then resell *for their own account.*

In both instances, whether acting on behalf of the airlines or its own account, the travel agent is involved in the sale of air transportation. It is precisely this activity and the gross receipts derived therefrom that 49 U.S.C. § 1513(a) puts beyond the power of State and local taxation. That the Virgin Islands tax is measured against the portion of the gross proceeds from the sale of air transportation received by travel agents does not make the tax any less a prohibited tax on the "sale of air transportation". *Cf. Aloha Airlines, Inc. v. Director of Taxation, supra,* 464 U.S. at 13-14.

CONCLUSION

For the foregoing reasons, the Petition for a writ of certiorari should be granted. The decision of the Court of Appeals contravenes the plain language of 49 U.S.C. § 1513(a) and, in the process, has impermissibly and erroneously substituted the judgment of the court on a matter on which the Congress has made a clear legislative determination. By opening up the sale of air transportation by travel agents to State and local gross receipts taxes, the decision below creates the possibility of a substantial disruption in the economic structure of the sale of air transportation as part of the national air transportation system. The decision of the Court of Appeals will also surely result in widespread litigation concern-

ing the pre-emptive effect of 49 U.S.C. § 1513(a) as more and more States and local governments move to extend their sales and gross receipts taxes to the "sale of air transportation" by travel agents—an area which the Congress intended to be out of bounds to State and local taxation of the type involved in this case.

Respectfully submitted,

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